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## Debate: Worker

### (mis)classification

#### Lynda J. Burkinshaw

'Employee', 'self-employed', 'quasi-employee', 'hybrid circumstances', 'atypical worker', 'flexible worker', 'contractor', 'temporary worker', 'homeworker', 'agency worker', 'independent professional', 'non-employer business', 'off-payroll'... Workers are classified as either 'employees' or 'self-employed' for reasons of employment law, tax law, social security etc. This distinction is now being questioned (Urwin, 2011). At each end of the scale, it will be clear where individuals fit, but ways of working have changed and there are increasing numbers of borderline cases (Freedman 2001; Urwin 2011). Worker classification is important in many countries, as tax treatments and employment rights differ.

A UK business is subject to penalties if it engages a self-employed worker whose status is subsequently found to be 'employee'. Status is determined by case law, which is subjective. One way to protect a business from status problems in the UK is to engage individuals operating via their own company, creating an 'intermediary' between the engager and the worker. This enables both parties to save taxes and national insurance (NI) costs, but, is there 'disguised employment'? To prevent tax avoidance, contentious and complex rules reliant on status case law (the Intermediaries Legislation) were introduced in 2000. If the legislation applies the worker suffers more NI and tax. This ignores the contradiction that workers may be treated as employees for tax, but not for employment protection purposes (Redston, 2009) and largely disregards the fact that they run a business.

Ordinarily, the intermediary determines if the legislation applies; however, rules differ for public sector workers (HM Treasury, 2012). The UK public sector currently seeks 'assurance' of the tax position of workers not on the payroll, but proposals are that, in future, it will *decide* if the intermediaries legislation applies (HMRC, 2016). A digital tool offering 'certainty', promised by HMRC to help achieve this, remains to be seen. Certainty has not been a feature of this legislation to date.

Similar tax issues exist in Canada and Australia. In Canada, if the individual is deemed to be an 'incorporated employee', based on case law, the tax payable can be greater than that of a genuine employee (Grant Thornton, 2015). Australia uses a 'test' approach based on the amount of personal services income and the source from which it is derived, to determine disguised employment. This may offer more certainty than the UK system, but it may be 'more draconian' and increased taxes may result (see [contractorcalculator.co.uk](http://contractorcalculator.co.uk)).

Status is not just a tax issue. Uber drivers in the USA are engaged as independent contractors, but want to be treated as employees. The case highlights the problems of applying employment tests that evolved prior to today's modern working practices, as for example, drivers provide their own vehicle, provide services 'on demand', and may never see their engager (Means and Seiner, 2016). If workers are treated as employees, this means increased costs for employers; hence a reason to use intermediaries.

Trying to fit new working practices into existing classifications involves time and cost. This may worsen for an already stretched UK public sector. Some suggest that alignment of tax and social security rates may solve the classification problem in the UK (see Freedman, 2001). This may be so

for tax, but what about employment issues? Roger Mullin MP (Scottish Nationalist Party), called for a review in April 2016, as reported by White (2016): 'the current system of shoehorning [contractors] into either employed or self-employed...is out of date and not fit for purpose'. Perhaps a new classification of worker (OTS, 2015) or 'novel' approach (Means and Seiner, 2016, p. 1511) is needed. The UK government claims to encourage business, but subjects it to complex laws. A radical change of direction is surely overdue.

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